

The Future of Environmental Law

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The world that I found when I left Yale College has changed a great deal, and it is still changing. Protection of the environment is still a tremendously important societal goal, but the problems that confront us and the kinds of solutions that we will have to craft to address them are very different. I would like to mention a number of major changes that I think have occurred—are occurring—which are going to affect the practice of environmental law for years to come.

First, the scale of environmental problems has changed enormously. In the late 1960s, lawyers like myself believed that environmental laws and regulations had to be strengthened and broadened. State and local laws often were inconsistent if they existed at all, pollution havens were notorious, and states were tempted to compete for new industry by avoiding enactment of environmental laws. Interstate transportation of pollution also posed equity problems. States with few environmental regulations could send their pollutants through the air or in the water to states that had stronger restrictions. To make matters worse, the technical understanding needed to sort through those problems was often unavailable at the state level.

Faced with this situation, the country did something that was unprecedented at the time. During the 1970s, we passed close to a dozen major environmental laws meant to protect us in a relatively comprehensive way. For the first time in history, an industrialized, technologically advanced nation enacted sweeping federal legislation to protect human health, natural systems, and the environment nationwide.

Nevertheless, those efforts were only a faint foreshadowing of the work that we have to do in the 1990s and beyond as we try to solve environmental problems on a global scale. As we face global warming trends, destruction of stratospheric ozone, and depletion of tropical rain forests, the political hurdles are daunting. If we thought it was difficult to convince Democrats and Republicans, large and small states, and high and low sulfur coal areas of the need to agree on a Clean Air Act in 1970, wait until we try to convince all of the nations of the world that they

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should cut down on fossil fuel use to stop global warming. Yet that is exactly what we have to do if we are to manage the global environment in the years ahead. And there is no precedent for this multinational cooperation. We face a huge job in trying to overcome the political, economic, religious, and cultural differences that have separated nations for hundreds of years. Given these problems, we absolutely cannot act unilaterally. We must bring the rest of the world along. To do that, I think we must demonstrate by the effectiveness of our environmental actions here at home that we deserve a leading role in global environmental protection.

The second point I want to make is that the kinds and numbers of sources that contribute to so many serious environmental problems have proliferated enormously. Back in the 1960s, our task seemed relatively straightforward. We identified some of the major contributors to pollution. The pall of smog that hung over Pittsburgh or the fire that burned on the Cuyahoga River are obvious examples. What we had to do at that time was to convince the public that the pollution problems were intolerable and yet solvable, that the economic cost of addressing them was affordable and worth paying.

In large part, the environmental improvements that resulted from our actions are undeniable. When talking about the environmental problems that we face as a society today, we should acknowledge to the country that we have come a long way, and we should be proud of that fact. We made huge investments, and we got a lot for them. I personally think that the experience of environmental improvement in the 1970s is one of the great success stories of American life and history. We ought not to let the public forget that because they are going to be asked to make more sacrifices in the years ahead. They need to understand that these investments have, in fact, paid off before and will pay off again.

Reducing the pollution from so many large utility and industrial facilities in the past was one thing. We now have to face very serious environmental threats from millions of small, highly decentralized, and diversified sources. Reducing these threats is going to be a much more difficult job because the sources of many of our worst pollution problems today can be found in our homes, neighborhoods, and small businesses. For example, ground-level ozone pollution—smog—is caused by millions of automobiles, paint shops, bakeries, and print shops. I

had a visit earlier this week from the Chemical Manufacturers' Association, which has done a very good job of reporting the toxic air, water, and land emissions associated with that industry. They told me, "We notice compliance by other industries is much less than that of the chemical industry, and the data that you have suggests that those industries cause a disproportionately large part of the problem." Well, they are absolutely right. The reality is that many other companies—print shops, large bakeries, dry cleaners—do not believe that they are contributing seriously to the pollution problems of our major cities, and yet they are. To control this pollution is going to require lifestyle-altering actions at the local level, actions that the federal government would have a very difficult time defining or implementing.

The South Coast Air Quality Basin is proposing to do away with drive-in restaurants and banks as part of its ozone control plan. Can you imagine the federal government, a Republican Administration's Environmental Protection Agency, even one run by a crazed tree-hugger, trying to get away with any such thing? Yet, that is what they are proposing in Los Angeles. Another good example is pollution of estuaries. I spent much of today learning about the problems of Long Island Sound. There are literally millions of small, decentralized sources of pollution along the coast itself and millions more located well inland. Lawn fertilizers and backyard garden insecticides used in Brattleboro, Vermont end up contributing pollution to Long Island Sound. Farm and ranch fertilizers, pesticides, and herbicides, used outside Bismarck, North Dakota end up as part of our problem in the Gulf of Mexico. Oil and gas residues washed off the streets of Twin Falls, Idaho end up in the Pacific Ocean. And there are many more examples like these.

In all of these cases, I think our national response is going to require the coordinated efforts of federal, state, and local governments, of businesses, and of individual families. There remains a major task of environmental education, of building the environmental ethic, and of changing personal behavior in fundamental ways. But our educational efforts are going to have to be increasingly sophisticated. The kinds of techniques that were effective for us in the 1970s are likely to be less relevant and perhaps less useful. I hope that in the future we are more successful in educating the public about risk so that they are less susceptible to fear and more capable of making the kinds of decisions that we expect informed citizens to make.

EPA has to base its decisions on data that are often incomplete,

contradictory, or ambiguous. Moreover, if we can keep regulatory disagreements on a more scientific plane, the public will be much more willing to learn from the issues and then make up their own minds. None of us wants to read about the arcane details of risk assessment. What we all want is to be reassured that the people making the decisions have our own interests and values at heart and can be trusted. And that said, the fine print does not matter. I take as one of my principal responsibilities, and one of the things that I really hope to accomplish, is the creation of that kind of public trust in our regulatory programs.

But what does all this mean for young lawyers? First, I would say that you should pay much more attention to international law, diplomacy, and foreign languages than lawyers did twenty years ago. Second, I think you ought to pay more attention to local zoning laws, city codes, and state laws than lawyers did twenty years ago. One of the defects, one of the failings of the environmental movement in this country, has been an inability to organize in the state capitals to the same degree that the movement has organized in Washington. The really innovative ideas, the creative programs over the past eight to ten years, have come from the state level. For a variety of reasons, many new ideas will continue to come from there, and one of EPA's major tasks will be to encourage and cooperate with the local efforts.

The third point I want to make is that the enforcement of environmental laws is absolutely essential. I intend to give enforcement a very high priority. I think it is at the very heart of the integrity and the commitment of our regulatory programs. But in the environmental protection business of the future, proper incentives are going to become increasingly important. One in three of our municipal sanitary landfills will become obsolete in the next five years. That is going to pose a crisis of extraordinary impact in this society. We must encourage businesses to redesign manufacturing processes and to use less toxic materials. We generate far more hazardous and solid waste per capita than most other industrialized countries. That is a cause for discouragement to some; to me, it is a suggestion that we can do better. For example, in the early 1970s we reduced energy use per unit of GNP by forty percent, yet the economy continued to grow. Now the same kind of performance is required with respect to waste.

Fourth, I would like to suggest that we think about environmental law in a somewhat different way than we did in the 1960s.

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As I look back on my own experience, I was trained to understand systems so as to perceive their vulnerabilities, the places at which they were susceptible to manipulation, and then to try to intervene in those systems and alter them to serve a specific interest. Environmental lawyers in the 1970s wrote a long list of laws to protect the environment, pollutant by pollutant, facility by facility, medium by medium. Taken together, those laws are now somewhat inconsistent or even conflicting—they give us little idea of the relative seriousness of the different environmental problems they were meant to solve. So I would hope to take a fresh look at environmental law, thinking in terms of systems, incentives, and multimedia approaches. We should not ask the question: How do I get that pollutant out of the air? But, where is the most efficient place to intervene in the system, across the spectrum of air, water, and land, to remove this threat to human health?

In a very real sense, we approach the decade of decision on the environment. We must first set an example here in the United States. We cannot lead if we are not out front at home. We intend and hope to do both. We are very determined to make a difference, to make our moment count, and to prepare the country for the next century. We need to move the environment from the margins of public policy where it has always been, and in my experience where it is in every other country of the world, and move it into the mainstream, both as a matter of domestic policy and foreign affairs.

